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Supreme Court of the United States

October Term, 1977

No. 77-1239

FIRST NATIONAL BANK OF AKRON,
Petitioner,

vs.

THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

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Supreme Court of the United States

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No. .....

FIRST NATIONAL BANK OF AKRON,
Petitioner,

vs.

IRVING R. KAUFMAN, Chief Judge, United States Court of Appeals, Second Circuit, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

Petitioner, First National Bank of Akron, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered on December 9, 1977.

REFERENCE TO OPINIONS BELOW

An opinion under date of August 8, 1977 of the Judicial Panel on Multidistrict Litigation has not been officially reported. It is presented in Appendix, p. 1.

An opinion under date of December 9, 1977 of the United States Court of Appeals for the Second Circuit has not been officially reported. It is presented in Appendix, p. 13.

JURISDICTIONAL STATEMENT

On December 9, 1977, the United States Court of Appeals for the Second Circuit denied a petition for an extraordinary writ in the nature of certiorari and mandamus which petitioner and others had filed pursuant to 28 U.S.C. §1407(e) seeking a review of an Order of the Judicial Panel on Multidistrict Litigation.

Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does 12 U.S.C. §94 which provides that all "actions and proceedings" against the First National Bank of Akron must be had in the Northern District of Ohio, the district in which it is established, preclude a transfer under 28 U.S.C. §1407 of a suit filed in the Northern District of Ohio against the First National Bank of Akron to the Southern District of New York for coordinated or consolidated pretrial proceedings?

FEDERAL STATUTORY PROVISIONS

The statutory provisions which are involved in this petition are the following:

12 U.S.C. §94:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

28 U.S.C. §1407(a):

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multi-district litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

STATEMENT OF THE CASE

Petitioner, First National Bank of Akron, is a national bank, with its principal place of business in Akron, which is geographically within the Northern District of Ohio.

Petitioner is the defendant in a civil action filed October 21, 1976, in the United States District Court for the Northern District of Ohio, captioned *"James Bloor, as Trustee, Pursuant to Chapter X of Title 11 of the Estates of Investors Funding Corporation of New York, et al. vs. First National Bank of Akron"*, designated as Case Number C76-336A, in the Northern District of Ohio, and assigned to Judge Leroy J. Contie, Jr. Jurisdiction was in-

voked, among other sections, under 11 U.S.C. §§107(e), 110(e) and 502.

Petitioner is also a co-defendant along with 187 other defendants, in a civil action by the same plaintiff filed October 12, 1976, in the United States District Court for the Southern District of New York, captioned *"James Bloor, as Trustee, Pursuant to Chapter X of Title 11 of the Estates of Investors Funding Corporation of New York, et al. vs. Jerome Dansker, et al."*, designated as Case Number 76 Civ. 4676, and assigned to Judge William C. Conner.

Both actions assert the identical claims against this petitioner, it being claimed that the First National Bank of Akron received a transfer which was voidable by virtue of both the New York and Ohio Fraudulent Conveyance Act (both states, with minor variations, having adopted the Uniform Fraudulent Conveyance Act) or the Bankruptcy Act Fraudulent Conveyance Section, 11 U.S.C. §107(d), with other claims for relief based on the same allegations.

On December 2, 1976, James Bloor, as Trustee pursuant to Chapter X of the Bankruptcy Act, filed a motion before the Judicial Panel on Multidistrict Litigation, to transfer the case against this petitioner, pending in the Northern District of Ohio, and other cases, to the Southern District of New York pursuant to 28 U.S.C. §1407. Petitioner opposed the motion to transfer and orally argued at the hearing against such transfer.

In the matter pending in the Southern District of New York, this petitioner, as a defendant, moved to dismiss or to transfer to the proper district, based on improper venue in the Southern District of New York, and to dismiss based on lack of personal jurisdiction in the Southern District of New York.

The case against this petitioner pending in the Northern District of Ohio was transferred by the Judicial Panel on Multidistrict Litigation on August 8, 1977 by Order directing such transfer to the Southern District of New York, for coordinated or consolidated pretrial proceedings with various other actions pending in the Southern District of New York.

Petitioner and other national banks timely sought review of the Order of the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. §1407(e). To this end, a petition for an extraordinary writ in the nature of certiorari and mandamus was filed in the United States Court of Appeals for the Second Circuit. The petition was subsequently denied without benefit of a written opinion or argument by the United States Court of Appeals for the Second Circuit, by Order entered on the 9th day of December 1977.

Petitioner is seeking review of the Order of the United States Court of Appeals for the Second Circuit which denied its petition for an extraordinary writ, directed to the Panel, to enter an Order denying and reversing the transfer of the Northern District of Ohio case.

REASON FOR GRANTING THE WRIT

12 U.S.C. §94 WHICH PROVIDES THAT ALL "ACTIONS AND PROCEEDINGS" AGAINST A NATIONAL BANK MUST BE HAD IN THE DISTRICT IN WHICH THE BANK IS ESTABLISHED PRECLUDES TRANSFER OF A SUIT AGAINST A NATIONAL BANK TO ANOTHER DISTRICT FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. §1407.

Petitioner submits that the decisions below misconstrued the power of the Judicial Panel on Multidistrict Litigation (Panel) to transfer its case to the Southern District of New York under 28 U.S.C. §1407, and in so doing ignored the dictates of 12 U.S.C. §94 and the recent decision of this Court in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

The Panel has considered the relationship between 12 U.S.C. §94 and 28 U.S.C. §1407 in several reported decisions prior to the one which underlies this petition. *In re Great Western Ranches Litigation*, 369 F. Supp. 1406 (J.P.M.L. 1974); *In re Pittsburgh & Lake Erie Railroad Company Securities & Antitrust Litigation*, 374 F. Supp. 1404 (J.P.M.L. 1974); *In re Falstaff Brewing Corporation Antitrust Litigation*, 434 F. Supp. 1225 (J.P.M.L. 1977).

In its decision below, the Panel stated:

> [i]n response to similar arguments opposing the transfer of actions in which national banks are defendants, the Panel has ruled as follows: 'We see no reason, including anything in *Radzanower*, to exempt actions involving national banks from transfer under Section 1407.' *In re Investors Funding Corporation of New York Securities Litigation.* (Appendix p. 8)

Unless and until guidance is supplied by appellate courts, the Panel will doubtless adhere to its analysis of 12 U.S.C. §94. The denial of the writ by the Court of Appeals provides no such guidance.

A. Pretrial Discovery Is a Section 94 Proceeding and Therefore Can Only Be Had in the District Where a National Bank Is Established.

Section 94 of the National Bank Act, 12 U.S.C. §94, provides that all "actions and proceedings" against First National Bank of Akron shall be in the Northern District of Ohio. Although the statute uses the word "may", the language of 12 U.S.C. §94 has been held to be mandatory. *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 562-63 (1963). *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 152 (1976). There is a rational basis for the special treatment accorded national banks. *Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc.*, 480 F.2d 798, 800 (5th Cir. 1973).

As this Court noted in *Radzanower, supra* at 156.

> The venue provision of the National Bank Act, §94, was intended . . . for the convenience of those [banking] institutions, and to prevent interruption in their business that might result from their books being sent to distant counties . . . . *Charlotte Nat. Bank v. Morgan*, 132 U.S. 141, 1945, quoted in *Mercantile Nat. Bank v. Langdeau*, 371 U.S., at 561-562 n.12.

28 U.S.C. §1407 essentially is designed to facilitate discovery where multiparty actions are pending in more than one district. When certain requirements are satisfied, pretrial proceedings "may be transferred". A case may ac-

tually be determined by a transferee court since it has the power to grant summary judgment. *Humphreys v. Tann,* 487 F.2d 666 (6th Cir. 1973), *cert. den'd,* 416 U.S. 956 (1974).

The Panel noted below that "[i]n considering transfer under Section 1407, the Panel is not encumbered by considerations of venue including those under 12 U.S.C. §94." *In re Investors Funding Corporation of New York Securities Litigation* (Appendix, p. 8), quoting *In re Falstaff Brewing Corporation Antitrust Litigation,* 434 F. Supp. 1225, 1229 (J.P.M.L. 1977). That observation does not confront the issue of whether the "proceedings" of 12 U.S.C. §94 connotes more than the place of trial.

"Venue" refers to the place where a lawsuit may be heard and determined. *Riley v. Union Pacific R.R. Co.,* 177 F.2d 673, 675 (7th Cir. 1949), *cert. den'd,* 338 U.S. 911 (1950). But 12 U.S.C. §94 is not the typical venue statute which focuses on types of claims or geographical location of defendants. Section 94 focuses on "actions and proceedings" involving a particular type of defendant.

"Proceedings" are defined as "the forum in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of defending them, and of executing" and include the "regular and usual mode of carrying on a suit by due course at common law". *Erwin v. United States,* 37 F. 470, 488 (S.D. Ga. 1889), *rev'd on other grounds sub nom., United States v. King,* 147 U.S. 676 (1893).

The motion of the Trustee under 28 U.S.C. §1407 sought a consolidation or coordination of pretrial discovery proceedings with respect to the merits of all of the actions, and as the Iowa Supreme Court said in *Murphy v. The First National Bank of Chicago,* 228 N.W.2d 372 (Ia.

1975), ". . . there is a measure of logic in defendants' contention [that] the taking of depositions and filing of interrogatories constitute 'proceedings' within the intendment of 12 U.S.C.A. 94." *Murphy, supra* at 377. In that case, the court explicitly limited discovery against a national bank sued outside of its home district to the ascertainment of whether or not the national bank had waived the protection of 12 U.S.C. §94. No discovery was permitted on the merits of the lawsuit since such discovery would constitute a "proceeding" within the meaning of Section 94.

In other contexts pretrial discovery has been held to fall within the definition of "proceedings". In *Commercial Credit Co. v. McReynolds,* 68 F.2d 990 (D.C. App. 1934) interrogatories to the wife of a judgment debtor were within the purview of a provision of the District of Columbia Code which provided that in civil proceedings a wife was competent but not compellable to testify against her husband. In *American Shipbuilding Co. v. Whitney,* 190 F. 109 (C.C.N.D. Ohio 1911), the court held that taking depositions amounted to a proceeding in a state court under Section 720 of the Revised Statutes of the United States which provided, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state . . . ."

Thus it seems clear that 12 U.S.C. §94 provides for more than the mere place of trial and that the "proceedings" of 12 U.S.C. §94 include, among other things, the "pretrial proceedings" of 28 U.S.C. §1407. Furthermore, as noted above, the entire action which was filed in the Northern District of Ohio might be determined in the Southern District of New York since the transferee court has the power to grant summary judgment.

The decisions below resolved the apparent conflict between 12 U.S.C. §94, which provides that all proceedings

against a national bank shall be in the home district, and 28 U.S.C. §1407, which provides that pretrial proceedings may be transferred, in favor of 28 U.S.C. §1407. The result is that Section 94 provides no protection to the petitioner at the pretrial level, notwithstanding the fact that "proceedings" are being conducted in the Southern District of New York pursuant to the Panel's Order.

B. 12 U.S.C. §1407 Did Not Effect a Pro Tanto Repeal of the Provisions of 12 U.S.C. §94 Which Provides That Proceedings Against a National Bank Can Only Be Had in the District in Which It Is Established.

The decision of this Court in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), which reaffirmed the meaning and effect of 12 U.S.C. §94, was apparently deemed irrelevant by the Panel and the Court of Appeals. In *Radzanower* this Court was confronted with an apparent conflict between two statutes: 12 U.S.C. §94 and the venue provision of the Securities Exchange Act, 15 U.S.C. §78aa. The petitioner in *Radzanower* had instituted a class action in the District Court for the Southern District of New York, against many defendants, including the First National Bank of Boston, alleging violation of federal securities law. The bank moved to dismiss, relying on 12 U.S.C. §94. The motion was granted by the trial court and subsequently affirmed by the Court of Appeals and by this Court. Petitioner's argument that there had been a *pro tanto* repeal of §94 was unsuccessful.

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Radzanower, supra* at 153, citing *Morton v. Mancari*, 417 U.S. 535.

Section 94 clearly deals with a precise narrow subject matter, while Section 1407 deals with the general subject of pretrial discovery. However, there are two exceptions to the principle that *pro tanto* repeals are not favored:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. *But, in either case, the intention of the legislature to repeal must be clear and manifest . . . . Radzanower, supra* at 154, citing *Posadas v. National City Bank*, 296 U.S. 497, 503. (Emphasis added)

Those exceptions are just as inapplicable here as they were in *Radzanower*.

There is no irreconcilable conflict. The two statutes can co-exist. The basic purposes of 28 U.S.C. §1407 will not be frustrated by precluding transfer as to national banks since transfer in the vast majority of cases would not be affected. Discovery could still be had against a national bank in its home district.

Not only is there no irreconcilable conflict, but the statutes can be harmonized in the following manner: 28 U.S.C. §1407 provides that certain civil actions may be transferred and those actions shall be transferred upon, among other things, a determination that a transfer will be for the convenience of the parties. 12 U.S.C. §94 provides that for the convenience of national banks, all

proceedings against them shall be in the home district. Accordingly, 12 U.S.C. §94 can be read as creating an irrebuttable presumption that as to national banks, the convenience element of 28 U.S.C. §1407 can never be satisfied.

Petitioner's interpretation of the two statutes would give full effect to the goals of Section 94, i.e. the convenience of banking institutions and the prevention of interruption of their business, without frustrating the goals of Section 1407.

> [W]hen two statutes are capable of co-existence, it is the duty of courts, absent a clearly expressed legislative intention to the contrary, to regard each as effective. *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

This Court's decision in *Citizens & Southern Nat. Bank v. Bougas,* ..... U.S. ....., 54 L. Ed. 2d 218, 98 S. Ct. ..... (1977), was predicated on the fact that its interpretation of the word "located" under 12 U.S.C. §94 would not "inconvenience the bank or unfairly burden it with distant litigation in violation of any congressional policy." *Supra* at 226 n.10. The same concern for the congressional policy is not reflected in the opinions below.

As to the second possible exception, 28 U.S.C. §1407 does not cover the whole subject of 12 U.S.C. §94 and was not intended as a substitute for any provisions of the National Bank Act. The National Bank Act regulates banks. The legislation on multidistrict litigation is not designed to regulate banks. There is nothing in the legislative history to support the conclusion that a *pro tanto* repeal of Section 94 was intended, with some aspects of bank regulation being transferred to 28 U.S.C. §1407.

If Congress actually intended to repeal a portion of 12 U.S.C. §94, let it do so directly. *Mercantile Nat. Bank. v. Langdeau,* 371 U.S. 555, 577 (1963). If Section 94 imposes inconvenience on plaintiffs in the pretrial context, the proper remedy lies in legislation. *Klein v. Bower,* 421 F.2d 338, 342 (2nd Cir. 1970).

C. 12 U.S.C. §1407 Cannot Be Used to Circumvent the Mandatory Provisions of 12 U.S.C. §94.

Attempts to obviate Section 94 have been disapproved in other contexts. *In re Truck Accident near Alamagordo. New Mexico,* 387 F. Supp. 732 (J.P.M.L. 1975); *Swiss Israel Trade Bank v. Mobley,* 319 F. Supp. 374 (S.D. Ga. 1970); *Super Valu Stores, Inc. v. Western Film Service,* 416 F. Supp. 662 (D. Minn., 1976).

To date, the Trustee's end run around 12 U.S.C. §94 has been eminently successful. The Trustee filed identical actions as to petitioner in both the Northern District of Ohio and the Southern District of New York. The former was transferred to the Southern District for pretrial discovery under the Panel's Order. In denying the Petitioner's motion to dismiss in the original Southern District, action, the District Court reasoned that since the First National Bank of Akron was in the Southern District of New York under Section 1407 in any event, it was not necessary to grant the motion at that time. (Appendix, p. 14) Thus, petitioner is being denied a prompt determination of what the magistrate characterized in Report No. 7 to Judge William C. Conner as a matter of "real substance." A discovery deadline and trial date had been set in Ohio before the transfer. The door will be opened to a vindication of 12 U.S.C. §94 and a prompt adjudica-

tion of the claims against petitioner only if this petition is granted.

CONCLUSION

For the reasons set forth herein, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

(Filed August 8, 1977)

Docket No. 2

BEFORE THE JUDICIAL PANEL
ON
MULTIDISTRICT LITIGATION

IN RE INVESTORS FUNDING CORPORATION OF NEW YORK SECURITIES LITIGATION

OPINION AND ORDER

BEFORE JOHN MINOR WISDOM, CHAIRMAN, AND EDWARD WEINFELD, EDWIN A. ROBSON, WILLIAM H. BECKER*, JOSEPH S. LORD, III*, STANLEY A. WEIGEL*, AND ANDREW A. CAFFERTY, JUDGES OF THE PANEL

PER CURIAM

This litigation consists of seven actions pending in five federal districts—three in the Southern District of New York and one each in the Northern District of Illinois, the Northern District of Ohio, the Eastern District of Virginia and the District of the District of Columbia. The actions center around the investment activities of

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*Judges Becker, Lord and Weigel took no part in the consideration or decision of this matter.

Investors Funding Corporation of New York, Investors Funding Collateral Corporation and a number of related corporations (collectively referred to as IFC). The principal business of IFC, prior to its entrance into bankruptcy proceedings during October 1974, was the purchase and sale of real property, the making of mortgage loans, and participation in other real estate related transactions.

Bloor, one of the actions pending in the Southern District of New York, was brought under the federal securities laws and the bankruptcy laws, *inter alia*, by the trustee in bankruptcy for IFC against nearly 200 named defendants and 24 "Doe" defendants. Included as defendants are the officers and directors of IFC; the trustees of IFC's profit sharing plan; attorneys, accountants and appraisers of real estate for IFC; several real estate ventures and the participants in those ventures; several banks; over 100 alleged recipients of voidable fraudulent transfers of IFC's assets; and 22 alleged recipients of voidable preferential transfers of IFC's assets. *Bloor* is also brought against separate purported defendant classes consisting of the partners in two of the defendant accounting firms or various participants in the named real estate ventures. The complaint in *Bloor* contains allegations concerning a wide variety of activities of the different defendant groups. The officers, directors, attorneys, accountants and appraisers are alleged to have participated in a scheme through which the assets and profits of IFC were overstated and the liabilities and losses of IFC were understated, thereby allowing profits to be reported when none were earned and presenting the creditors of IFC and investors in IFC with a false and misleading impression of the financial condition of IFC. The officers and directors allegedly engaged in a series of sham transactions and purchase and buy-back agreements designed to inflate falsely the assets and profits of IFC.

The appraisers allegedly predicted income figures for properties of IFC that were significantly higher than realistically might be expected and predicted unreasonably low expenses for the properties. The defendant banks, which are creditors of IFC, allegedly concealed certain inside information about IFC's financial condition and used that information to their benefit and to the detriment of the other creditors of IFC and the public. Fourteen of the fifteen original bank defendants are alleged to have collectively entered into certain credit and security agreements with IFC through which unsecured loans made to IFC by the banks were converted to secured loans, thereby giving the banks a position superior in interest to that of other creditors of IFC. These fourteen banks and one of the principals of IFC are also alleged to have entered into a secret verbal agreement which required proceeds from the sale of properties by IFC to be paid to the banks to reduce the loans outstanding rather than be reinvested by IFC in other properties, thereby resulting in a secret liquidation of the assets of IFC for the benefit of the banks. Several defendants, including many of the defendant real estate ventures and the participants in those ventures, are alleged to have participated in voidable fraudulent transfers of real property or other assets of IFC, to the financial detriment of IFC. Other defendants are alleged to have received transfers of the assets of IFC which are voidable preferences. The trustee asks for damages and the return of all assets of IFC that were transferred in voidable transactions.

Katz was instituted in the Southern District of New York under the federal securities laws, *inter alia*, as a class action on behalf of all purchasers of IFC common stock during the period from December 31, 1967 to October 21, 1974. Many of the same individuals or organizations that

are named as defendants in *Bloor* are named as defendants in *Katz*. Plaintiffs in *Katz* allege that defendants participated in fraudulent activities and the issuance of false and misleading statements which impaired the value of plaintiffs' investments in IFC. The specific activities in question include sham transactions at year's end to improve artificially IFC's balance sheet and income statement, purchase and buy-back transactions at inflated prices, and overstatement and misappropriation of IFC's assets.

Morse, the third action pending in the Southern District of New York, was brought under the federal securities laws, *inter alia*, as a class action on behalf of purchasers of certain IFC debentures during the period from July 28, 1972 to October 21, 1974. Defendants in this action are individual officers and directors of IFC, IFC's accountants, and three underwriters of IFC securities. The substantive allegations of fact in *Morse* are very similar to those made in *Katz*.

The four actions pending in districts other than the Southern District of New York (the bank actions) were each instituted by the trustee in bankruptcy for IFC against a single national bank. These four national banks were originally among the fifteen banks named as defendants in *Bloor*, but each of the four have since been dismissed or have made motions for dismissal from that action under the venue provision of the National Bank Act, 12 U.S.C. §94. The original complaints in the bank actions were identical to the complaint in *Bloor*. Subsequently, substantially amended complaints have been filed in the Virginia, Illinois and Ohio actions. The amended complaints in the Virginia and Illinois actions are brought under the federal securities laws and the bankruptcy laws, *inter alia*. The allegations which are made against the

defendant bank in each of those two complaints are essentially the same as the allegations which are made against the bank defendants in the complaint in *Bloor*. The amended complaint in the Ohio action is brought under the bankruptcy laws, *inter alia*. In that complaint, the trustee alleges that the defendant, First National Bank of Akron (Akron bank), caused a fraudulent transfer of certain funds of IFC to be made to the bank when the bank offset funds on deposit with it against the balance due on unsecured loans taken out by IFC. The trustee alleges that the Akron bank was in possession of confidential inside information concerning the financial condition of IFC when the transfer was made and that the transfer was made with the intent to hinder and defraud existing and future creditors of IFC. The trustee requests that the transfer be voided and that the claims of the Akron bank be subordinated to the claims of other creditors of IFC.

Plaintiff in *Bloor* and the four bank actions moves the Panel, pursuant to 28 U.S.C. §1407, to transfer the foregoing actions pending in districts other than the Southern District of New York to that district for coordinated or consolidated pretrial proceedings with the three actions pending there.[1] Twelve defendant banks oppose transfer. We find that these actions involve common questions of fact and that their transfer to the Southern District of New York pursuant to Section 1407 will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

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1. Plaintiff's motion originally included another action, *Bloor, et al. v. Dansker, et al.*, S.D.N.Y., 69-Civ-2741, but at the Panel hearing on this motion, plaintiff apparently retreated from including this action in the motion. Transcript at 2-3. Plaintiff advised the Panel that this action "has been, for all intents and purposes, settled." *Id.* at 3. No party disputed plaintiff's characterization of this action. Accordingly, we deem this action withdrawn from plaintiff's motion.

Several of the defendant banks contend, in opposition to transfer, that the four bank actions which are pending in districts other than the Southern District of New York are distinct from the actions pending in that district. *Katz* and *Morse*, the banks maintain, involve no issues in common with the claims against the banks. The complaint in *Bloor*, they assert, attempts to combine numerous claims against many unrelated defendants in a single action. The banks stress that the claims in *Bloor* concerning the massive fraud perpetrated by the principals of IFC are distinct from the claims made against each bank for the return of certain voidable preferences which were received in a small number of transactions. The banks assert that the vast majority of the issues involved in the New York actions are irrelevant to the banks. The minimal common aspects which are involved, the banks argue, are far outweighed by the predominance of unique issues among the actions.

Defendant Akron bank stresses, in opposition to transfer of the Ohio action, that the Akron bank is not alleged to have been a party to the security agreements which were executed by the other banks. The Akron bank states that claims against it are asserted only in connection with its offset of certain funds on deposit from IFC against loans outstanding to IFC. Therefore, the Akron bank contends, discovery in the Ohio action will relate only to the offset transaction, and will not involve the myriad of issues covered by the other actions.

We find these arguments unpersuasive. On the basis of the record before us, all seven actions, including the Akron bank action, involve substantial common questions of fact concerning the financial condition of IFC. In addition, *Bloor* and the Virginia, Illinois and District of Columbia bank actions share questions of fact concerning

the alleged collective activities of the banks and others in regard to IFC and the effect of those activities upon IFC, other creditors of IFC and other interested persons. Transfer under Section 1407 will therefore eliminate duplicative discovery, avoid the possibility of conflicting pretrial rulings and conserve judicial effort. Discovery on any issues that are unique to a particular action may be scheduled by the transferee judge to proceed concurrently with the common pretrial matters. *See In re Republic National-Realty Equities Securities Litigation*, 382 F. Supp. 1403, 1405-06 (J.P.M.L. 1974).

The defendant banks argue that the venue provision of the National Bank Act, 12 U.S.C. §94, prohibits the transfer pursuant to 28 U.S.C. §1407 for coordinated or consolidated pretrial proceedings of actions in which national banks are defendants. One bank maintains that Section 94 requires all proceedings against a national bank, trial as well as pretrial, to take place within the bank's home district. The banks stress that Section 94 was enacted for the convenience of the national banks to protect them from having to move their records outside their home districts. This policy of the Act, they assert, as discussed in the recent United States Supreme Court case of *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), would be violated by transferring the actions against the banks for pretrial purposes. The banks urge that, with respect to the four actions in which national banks are defendants, the motion before the Panel is in reality an attempt to circumvent the venue restrictions of the National Bank Act. They contend that movant is attempting to misuse Section 1407, citing *In re Highway Accident Near Rockville, Connecticut*, 388 F. Supp. 574, 576 (J.P.M.L. 1975) and *In re Truck Accident Near Alamagordo, New Mexico*, 387 F. Supp. 732, 734 (J.P.M.L.

1975), and they request that the Panel accordingly deny transfer in this litigation. If the Panel determines that transfer under Section 1407 is not restricted by the venue provision of the National Bank Act, the banks urge the Panel nevertheless to give deference to the policy behind that venue provision by denying transfer.

In response to similar arguments opposing the transfer of actions in which national banks are defendants, the Panel has ruled as follows:

> We see no reason, including anything in *Radzanower*, to exempt actions involving national banks from transfer under Section 1407. In considering transfer under Section 1407, the Panel is not encumbered by considerations of venue, including those under 12 U.S.C. §94. *In re Great Western Ranches Litigation*, 369 F. Supp. 1406, n. 1 (J.P.M.L. 1974). The fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent transfer of the actions against them to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied. *In re Kauffman Mutual Fund Actions*, 337 F. Supp. 1337, 1339 (J.P.M.L. 1972). Indeed, 28 U.S.C. §1407(a) states that "actions may be transferred to *any district* for coordinated or consolidated pretrial proceedings." (Emphasis added.) The legislative history of Section 1407 is also instructive on this point. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499-500 (J.P.M.L. 1968). The recent *Radzanower* opinion by the Supreme Court has no effect on transfers under Section 1407 because the opinion deals exclusively with the question whether the venue provision of the National Bank Act or the venue provision of the Securities Exchange Act controls in the event a national banking association is sued in a federal

> court for allegedly violating the Securities Exchange Act.
>
> Furthermore, we see no reason to accord national banks any special treatment in considering transfer of actions under Section 1407. The Panel's statutory mandate is to weigh the interests of all the plaintiffs and all the defendants, and to consider multidistrict litigation as a whole in light of the purposes of the law. *In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968).
>
> We emphasize that defendant national banks need not worry about a transferee court's entering an order requiring that their documents be moved outside their home districts for trial because transfers under Section 1407 are for pretrial because transfers under Section 1407 are for pretrial only and the actions against them will be remanded to their home districts for trial. *See* Rule 11, R.P.J.P.M.L., 65 F.R.D. 253, 260-63 (1975). Moreover, we note that transfer of an action under Section 1407 does not mean that all discovery must take place in the transferee district. For example, depositions of witnesses may still occur where they reside, *see* Fed. R. Civ. P. 45(d)(2), and of course any party may request an order from the transferee court that its documents be inspected at its offices or at another convenient location in or near the city in which it is located, *see Manual for Complex Litigation*, Part I, §2.50 (rev. ed. 1973).
>
> The defendant banks' reliance on *In re Highway Accident Near Rockville, Connecticut, supra*, and *In re Truck Accident Near Alamagordo, New Mexico, supra*, in suggesting that plaintiffs . . . are attempting to misuse Section 1407 in seeking transfer is mis-

placed. Those two litigations did not otherwise meet the standards for transfer under Section 1407, in contrast to the litigation now before us. Here significant benefits are to be gained by coordinated or consolidated pretrial proceedings. *In re Falstaff Brewing Corporation Antitrust Litigation*, ... F. Supp. ....., ... (J.P.M.L., filed June 3, 1977).

This reasoning is equally dispositive of the arguments of the defendant national banks in the litigation now before us.

The Southern District of New York is clearly the most appropriate transferee forum for this litigation. Investors Funding Corporation of New York and Investors Funding Collateral Corporation are headquartered within that district and therefore many of the relevant documents and witnesses are located in the New York vicinity. *See In re U.S. Financial Securities Litigation*, 375 F. Supp. 1403, 1404 (J.P.M.L. 1974). In addition, three of the seven actions involved here are already pending in the Southern District of New York. *See In re Joseph F. Smith Patent Litigation*, 407 F. Supp. 1403, 1405 (1976).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. §1407, the actions listed on the following Schedule A and pending in districts other than the Southern District of New York be, and the same hereby are, transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable William C. Conner for coordinated or consolidated pretrial proceedings with the actions listed on Schedule A and pending in that district.

SCHEDULE A

Docket No. 290

DISTRICT OF COLUMBIA	Civil Action No.
James Bloor, etc. v. Riggs National Bank	76-1958
DISTRICT OF COLUMBIA NORTHERN DISTRICT OF ILLINOIS	
James Bloor, etc. v. First National Bank of Chicago	76-C-3905
SOUTHERN DISTRICT OF NEW YORK	
James Bloor, etc. v. Jerome Dansker, et al.	76-Civ-4679 (WCC)
Morris Katz, et al. v. Jerome Dansker, et al.	76-Civ-4721 (WCC)
Robert Morse, et al. v. Peat Marwick Mitchell & Co., et al.	75-Civ-3681 (WCC)
NORTHERN DISTRICT OF OHIO	
James Bloor, etc. v. First National Bank of Akron	C-76-336A
NORTHERN DISTRICT OF OHIO EASTERN DISTRICT OF VIRGINIA	
James Bloor, etc. v. Virginia National Bank	76-639-N

CONCURRING OPINION

EDWARD WEINFELD, JUDGE OF THE PANEL, WITH WHOM JOHN MINOR WISDOM, CHAIRMAN OF THE PANEL, JOINS,

I concur in the decision of my brethren that the actions before us pending in districts other than the Southern District of New York should, pursuant to 28 U.S.C. §1407, be transferred to that district for coordinated or consolidated pretrial proceedings with the actions pending there. I also agree with my brethren that the venue provision of the National Bank Act, 12 U.S.C. §94, does not prohibit transfer under Section 1407 of actions in which national banks are parties. Unlike my brethren, however, I am of the view that the Panel should adopt as policy the Supreme Court's recent recognition in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), that the purpose of 12 U.S.C. §94 was to prevent interruption in the business of national banks that might result from their records being sent to distant counties, 426 U.S. at 156. Accordingly, I would include in the Panel's transfer order in this litigation a provision that with respect to the national bank defendants and discovery or inspection of their records shall be had only in each bank's home district.

ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS

(Dated December 9, 1977)

77-3053

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IN RE: FIRST NATIONAL BANK OF AKRON, THE FIRST NATIONAL BANK OF CHICAGO, THE RIGGS NATIONAL BANK OF WASHINGTON, D.C., AND VIRGINIA NATIONAL BANK,
Petitioners

A petition for a writ of mandamus having been filed

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied

/s/ IRVING R. KAUFMAN
Chief Judge
/s/ WILFRED FEINBERG
/s/ WILLIAM H. TIMBERS
Circuit Judges

ORDER OF THE UNITED STATES DISTRICT COURT

(Dated January 31, 1978)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re
INVESTORS FUNDING CORPORATION OF NEW YORK SECURITIES LITIGATION

MDL DOCKET NO. 290
Cross References
as Follows:
Morse v. Peat, Marwick
75 Civ. 3681(WCC)
Bloor v. Dansker
76 Civ. 679 (WCC)

ORDER

CONNER, *D. J.*:

Magistrate's Report No. 7 is confirmed with respect to the motions filed on behalf of First National Bank of Akron, Virginia National Bank, The Riggs National Bank of Washington, D. C. and the First National Bank of Chicago; the motions to dismiss on grounds of improper venue are denied without prejudice to their renewal upon completion of discovery to be conducted in the coordinated actions. The motion of defendant First National Bank of Akron to dismiss the complaint for lack of personal jurisdiction is denied, without prejudice to renewal upon com-

pletion of discovery herein. Magistrate's Report No. 7 is moot with respect to the motion on behalf of defendant Federal Deposit Insurance Corporation, as Receiver for Franklin National Bank, that action having been severed and transferred to the Eastern District of New York by agreement and upon this Court's order of January 31, 1978.

/s/ WILLIAM C. CONNER
United States District Judge

Supreme Court, U. S.
FILED
MAY 12 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1239

FIRST NATIONAL BANK OF AKRON,

PETITIONER,

vs.

THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, ET AL.,

RESPONDENTS.

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1239

FIRST NATIONAL BANK OF AKRON,

Petitioner,

vs.

THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, ET AL.,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

The rationale for the denial by the United States Court of Appeals for the Second Circuit of Petitioner's petition for an extraordinary writ apparently has been supplied by that Court in its decision in In The Matter Of New York City Securities Litigation, ____ F. 2d ____ (2nd Cir., decided March 2, 1978). (Appendix, p. 1). In that decision, a paragraph of which is quoted by Respondent at page 16 of its Brief in Opposition, the Court first found an irreconcilable conflict between 12 U.S.C. §94 and 28 U.S.C. §1407 and then found an implied partial repeal of Section 94. The issue of a pro tanto repeal is thus squarely drawn.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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First National Bank of Akron

APPENDIX

DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS

Decided March 2, 1978

77-3077

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IN THE MATTER OF NEW YORK CITY MUNICIPAL SECURITIES LITIGATION
PETITION OF THE FIRST NATIONAL BANK OF BOSTON FOR A WRIT OF MANDAMUS

Before FRIENDLY, MULLIGAN and MESKILL, Circuit Judges

FRIENDLY, Circuit Judge:

Pursuant to 28 U.S.C. §1407(e), The First National Bank of Boston (the Bank) seeks a writ of mandamus to review an order of the Judicial Panel on Multidistrict Litigation (JPML) in In re New York City Municipal Securities Litigation, Docket No. 314. The order granted requests by plaintiffs to transfer to the District Court for the

Southern District of New York for coordinated or consolidated pretrial proceedings two actions, Truncell v. The First National Bank of Boston and Friedlander v. The First National Bank of Boston, which had been brought against the Bank in the District of Massachusetts. The complaints in the Massachusetts actions alleged violations of the federal securities laws in connection with the marketing of New York City securities during 1974 and 1975. The Bank had initially been named as a defendant in actions brought by the same plaintiffs against it and other defendants in the District Court for the Southern District of New York for the same violations but had secured dismissal under the section of the National Bank Act, 12 U.S.C. §94, which provides that actions and proceedings against a national banking association "may be had . . . within the district in which such association may be established," a venue provision which the

Supreme Court has held to be mandatory and exclusive. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 152 (1976). These two actions remain pending in the Southern District of New York against other defendants as do four others raising similar questions. In addition, the Bank of America had likewise obtained dismissal from the Truncell and Friedlander actions under 12 U.S.C. §94. These plaintiffs then brought actions against it in the Northern District of California and upon stipulation two judges in that district transferred the California actions to the Southern District of New York for coordinated or consolidated pretrial proceedings. There are, therefore, a total of ten actions now pending.

Before the JPML the Bank objected that the proposed transfer of the Massachusetts actions to the Southern District of New York for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C.

§1407[1] would circumvent the national bank venue statute, 12 U.S.C. §94, which, as said in Charlotte National Bank v. Morgan, 132 U.S. 141, 145 (1889), quoted in Mercantile National Bank v. Langdeau, 371 U.S. 555, 561-62 n. 12 (1963), and in Radzanower, supra, 426 U.S. at 156, was enacted "for the convenience of those (banking) institutions, and to prevent interruption in their business that might result from their books being sent to distant counties." The JPML rejected this contention, as it had previously done, before Radzanower, in In re Great Western Ranches Litigation, 369 F. Supp. 1406 n.1 (1974), and after Radzanower, in In re Investors Funding Corp. of New York Securities Litigation, 437 F. Supp. 1199 (1977), and In re Falstaff Brewing Corp. Antitrust Litigation, 434 F. Supp. 1225, 1229-30 (1977). In Falstaff the JPML said:

> We emphasize that defendant national banks need not worry

about a transferee court's entering an order requiring that their documents be moved outside their home districts for trial because transfers under Section 1407 are for pretrial only and the actions against them will be remanded to their home districts for trial. See Rule 11, R.P.J.P.M.L., 65 F.R.D. 253, 260-63 (1975). Moreover we note that transfer of an action under Section 1407 does not mean that all discovery must take place in the transferee district. For example, depositions of witnesses may still occur where they reside, see Fed. R. Civ. P. 45(d)(2), and of course any party may request an order from the transferee court that its documents be inspected at its offices or at another convenient location in or near the city in which it is located, see Manual for Complex Litigation, Part 1, §2.50 (rev. ed. 1973).

Judge Weinfeld, concurring in Falstaff, would have included in the transfer order a specific provision that discovery or inspection of the records of national bank defendants should be had only in each bank's home district.

We begin by noting that §1407, unlike §§1404 and 1406, authorizes transfer of an action to "any district" and not simply to

a district where the action could have been brought. The use of this different language was deliberate; indeed, the limitation in §1404 was one of the reasons why it was necessary to enact §1407, see Report of the Co-ordinating Committee of the Judicial Conference on Multiple Litigation Recommending New Section 1407, Title 28, reprinted as an Appendix to In re Plumbing Fixture Cases, 298 F. Supp. 484, 499-500 (JPML, 1968); H.R. Rep. No. 1130, 90th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Adm. News 1898, 1900 (1968). However, neither this difference in language nor the JPML's point that the Massachusetts actions were brought in the districts required by 12 U.S.C. §94 and remain there in a state of suspended animation awaiting the conclusion of the pretrial proceedings completely answers petitioner's objection. Pretrial proceedings that normally would occur in Boston may now take place in New

York. While the purposes of §94 may be accommodated by an order that the bank's documents be inspected only in its home district, such an order must be requested of the transferee judge and will not issue automatically. See Manual for Complex Litigation, Part 1, §2.50 (rev. ed. 1973). Moreover the pretrial proceedings encompassed by §1407 include summary judgment, and history has indicated that once the limited transfer has occurred, the transferor district is not likely to see the case again. Realistically, therefore, the question must be faced whether by enacting §1407, Congress intended to override to this extent the venue provision of the National Bank Act, as it clearly did the various venue provisions of Title 28, ch. 87.

We have no doubt that it did. Even if §1407 is to be regarded as a partial repeal of 12 U.S.C. §94, it comes within the category of repeal by implication recognized

"where provisions in the two acts are in irreconcilable conflict." Posadas v. National City Bank, 296 U.S. 497, 503 (1936), quoted with approval in Radzanower, supra, 426 U.S. at 154. The contrast with the problem dealt with in Radzanower is evident. The Court concluded in that case that there was no "irreconcilable conflict" between the general provision of §27 of the Securities Exchange Act of 1934 permitting suits to be brought in any district where an act or transaction constituting a violation occurred or where the defendant is found or is an inhabitant or transacts business and 12 U.S.C. §94. In the Court's view, since even in the case of securities violations by national banks plaintiffs could still find districts where they could bring their suits, enforcement of 12 U.S.C. §94 was not necessarily repugnant to the Securities Exchange Act's "primary purpose of . . . provid(ing) fair

and honest mechanisms for the pricing of securities . . . .'" 426 U.S. at 155, quoting H.R. Rep. No. 94--229, at 91(1975). The Court did not read §27 as indicating that Congress was intent on having all suits, even by the same plaintiff for the same violation of the Securities Exchange Act, brought in the same district. See generally 426 U.S. at 156 n.12. On the other hand, the essential purpose of Congress in enacting §1407 was to permit the centralization in one district of all pretrial proceedings "(w)hen civil actions involving one or more common questions of fact are pending in different districts." As said in the report of the House Judiciary Committee, "(t)he objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions" and "(t)o accomplish this

objective the bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings." H.R. Rep. No. 1130, 90th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Adm. News 1898, 1899-1900 (1968) (emphasis supplied). As this case illustrates, the need for such centralized management of pretrial proceedings in multidistrict litigation exists equally when national banks are defendants, but could not be met in such cases if 12 U.S.C. §94 was held to prevent transfer under §1407. The "irreconcilable conflict" that signals implied repeal therefore exists. If §94 was to be preserved from the reach of 28 U.S.C. §1407, a specific exception would have been required. For excellent reasons Congress made none.

The petition for mandamus is denied.

1. 28 U.S.C. §1407(a). When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Supplemental Brief of Petitioner, First National Bank of Akron, were served on the following by mailing by First Class Mail to the respective party(ies) at the addresses indicated below:

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WADE H. McCREE, JR.
Solicitor General
Room 5614
United States Department
of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

Dated: May 10, 1978.

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National Bank of Akron
500 First National Tower
Akron, Ohio, --308

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Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1239

FIRST NATIONAL BANK OF AKRON,
Petitioner,

vs.

THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *et al.*,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT JAMES BLOOR AS TRUSTEE OF INVESTORS FUNDING CORPORATION OF NEW YORK

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May 5, 1978

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IN THE

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OCTOBER TERM, 1977

No. 77-1239

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Respondents.

BRIEF IN OPPOSITION OF RESPONDENT JAMES BLOOR AS TRUSTEE OF INVESTORS FUNDING CORPORATION OF NEW YORK

This brief is submitted on behalf of respondent James Bloor, as Reorganization Trustee ("Trustee") of Investors Funding Corporation of New York and 33 related entities ("IFC") pursuant to Chapter X of the Bankruptcy Act in opposition to the petition of First National Bank of Akron ("Akron Bank") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (P-A-13)[1] denying petitioner's petition for a writ in the nature of certiorari and mandamus to the Judicial Panel on Multidistrict Litigation ("Multidistrict

1. References beginning with P are to pages in Akron Bank's petition and P-A to the Appendix therein. Page references beginning with A are to the Appendix herein.

Panel") is not reported. The Multidistrict Panel's opinion is reported at 437 F.Supp. 1199 (JPML 1977).

QUESTIONS PRESENTED

1. Whether Congress intended to add the phrase "except civil actions involving national banks" when it enacted 28 U.S.C. § 1407 providing "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings"?

2. Was the Court of Appeals correct in refusing to reverse by extraordinary writ the Multidistrict Panel's discretionary transfer pursuant to Section 1407 of the Trustee's action against Akron Bank together with six other actions involving common questions of fact to the Southern District of New York for the purposes of coordinated or consolidated pretrial proceedings when the Multidistrict Panel found the transfer would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation?

STATUTES INVOLVED

The full texts of 28 U.S.C. § 1407, 12 U.S.C. § 94 and 15 U.S.C. § 78u(g) are set forth in the appendix.

STATEMENT OF THE CASE

The IFC reorganization proceedings are pending in the Southern District of New York. IFC has approximately 8,000 stockholders and approximately 27,000 debenture holders. There are approximately $227 million creditor claims which may be asserted in the reorganization proceedings against IFC's assets of approximately $70 million.

Following an investigation, the Trustee commenced an action in the Southern District of New York pursuant to, *inter alia*, the federal securities laws and bankruptcy laws against certain of IFC's officers, directors, accountants, a consortium of banks, attorneys and others. Akron Bank is a defendant in the Southern District of New York action. As a precaution, the Trustee filed four identical complaints against Akron Bank and three national banks in the consortium in the districts in which each was established so as to protect IFC's creditors in the event the four national banks established outside the Southern District of New York successfully moved to dismiss the Southern District of New York action pursuant to the venue provisions of 12 U.S.C. § 94.

The Trustee alleged in all of the actions that a consortium of banks (including four national banks established in New York) used inside information to their benefit and to the detriment of IFC and its creditors, and that Akron Bank, a recipient of this inside information from the banking consortium, used this inside information and fraudulently transferred IFC funds to Akron Bank. As recognized by the Multidistrict Panel:

> "[A]ll seven[2] actions, including the Akron bank action, involve substantial common questions of fact concerning the financial condition of IFC. In addition, *Bloor* and the Virginia, Illinois and District of Columbia bank actions share questions of fact concerning the alleged collective activities of the banks and others in regard to IFC and the effect of those activities upon IFC, other creditors of IFC and other interested persons. Transfer under Section 1407 will therefore eliminate duplicative discovery, avoid the possibility of conflicting pretrial

2. Two separate class actions on behalf of IFC stockholders and debentureholders were pending in the Southern District of New York.

rulings and conserve judicial effort." 437 F.Supp. at 1202.

Accordingly, the Multidistrict Panel granted the Trustee's motion pursuant to 28 U.S.C. § 1407 for transfer to the Southern District of New York of the four actions pending outside that district for coordinated or consolidated pretrial proceedings. *In re Investors Funding Corporation of New York Securities Litigation,* 437 F.Supp. 1199 (JPML 1977). The Multidistrict Panel quoted with approval its opinion in *In re Falstaff Brewing Corp. Antitrust Litigation,* 434 F.Supp. 1225 (JPML 1977):

> "'In considering transfer under Section 1407, the Panel is not encumbered by considerations of venue, including those under 12 U.S.C. § 94. *In re Great Western Ranches Litigation,* 369 F.Supp. 1406, n.1 (J.P.M.L. 1974). The fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent transfer of the actions against them to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied. *In re Kauffman Mutual Fund Actions,* 337 F.Supp. 1337, 1339 (J.P.M.L. 1972). Indeed, 28 U.S.C. § 1407(a) states that 'actions may be transferred to *any district* for coordinated or consolidated pretrial proceedings.' (Emphasis added.)'" 437 F. Supp. at 1202-1203.

Akron Bank and three other banks petitioned the Second Circuit for an extraordinary writ in the nature of certiorari and mandamus which was denied.[3]

THIS CASE PRESENTS NO BASIS FOR CERTIORARI

Akron Bank's petition does not meet any of the criteria for granting certiorari. Supreme Court Rule 19.

3. The three other national banks have *not* petitioned for certiorari. (Emphasis added throughout unless otherwise indicated.)

There is no conflict between circuits. In fact, judges representing eight of the ten circuits have participated in Multidistrict Panel decisions and agreed that the venue provisions of Section 94 do not preclude transfer under Section 1407 since the latter is not encumbered with venue considerations. *In re Falstaff Brewing Corp. Antitrust Litigation,* 434 F.Supp. 1225 (JPML 1977); *In re Great Western Ranches Litigation,* 369 F.Supp. 1406 (JPML 1974). There is no conflict between Section 94 and Section 1407. If there is a conflict it has been fully resolved by the Multidistrict Panel and Section 1407 clearly takes precedence.

Although Akron Bank claims that the Multidistrict Panel has decided a federal question in conflict with applicable decisions of this Court, no such conflict in fact exists. *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148 (1976), is not in conflict with this case. *Radzanower* held that the narrower venue provision of the National Bank Act prevailed over the broader venue provision of the Securities Exchange Act. Section 1407 is not encumbered by venue considerations and applies only after commencement of the action.

No important question of federal law has been decided which should be decided by this Court, rather judges representing eight circuits have consistently interpreted a Congressional statute in accordance with its plain language and purpose and the Second Circuit has refused to find this interpretation an abuse of discretion.[4]

4. Contrary to Akron Bank's assertion, the possibility of summary judgment in the transferee court is not a reason to grant the writ. Piecemeal review has been strictly circumscribed by Congress, 28 U.S.C. §§ 1291, 1292. The appropriate time for Akron Bank to appeal from summary judgment *against* it is *after the judgment* has been granted, not *prior* to the time a motion for summary judgment has been made. It is established that "extraordinary writs" cannot be used "as substitutes for appeals." *Ex parte Fahey,* 332 U.S. 258, 260 (1947).

TRANSFER OF THIS ACTION MEETS THE STATUTORY PREREQUISITES OF SECTION 1407

The Multidistrict Panel correctly held that transfer of the actions involving IFC "will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." 437 F.Supp. at 1201. The Multidistrict Panel determined that this action is one "of seven actions pending in five federal districts . . . [A]ll seven actions, including the Akron bank action, involve substantial common questions of fact concerning the financial condition of IFC. . . . Transfer under Section 1407 will therefore eliminate duplicative discovery, avoid the possibility of conflicting pretrial rulings and conserve judicial effort." 437 F.Supp. at 1199, 1202. The Second Circuit refused to find this determination an abuse of discretion.

This Court has recognized similar criteria under Section 1404(a):

> "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Continental Grain Co.* v. *Barge FBL-585,* 364 U.S. 19, 26 (1960).

The Multidistrict Panel rejected Akron Bank's contention that special venue statutes preclude transfer pursuant to Section 1407. This holding is consistent with its statutory mandate and prior determinations. "Venue is not a criterion in deciding the propriety of transfer under Section 1407." *In re Hotel Telephone Charge Antitrust Litigation,* 341 F.Supp. 771, 773 (JPML 1972). "Defendants' . . . argument is that Kauffman should not be able to secure from the Panel, under 28 U.S.C. § 1407, what the venue provisions of federal law otherwise prohibit. However,

the Panel's discretion under Section 1407 is not limited by venue considerations and the fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent their transfer to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied." *In re Kauffman Mutual Fund Actions,* 337 F.Supp. 1337, 1339 (JPML 1972).

The Multidistrict Panel as well as other courts and commentators have repeatedly recognized that Section 1407 is applicable to national banks. In *In re Great Western Ranches Litigation,* 369 F.Supp. 1406 (JPML 1974), the Multidistrict Panel transferred pursuant to § 1407 a case involving a national bank which earlier had been severed and transferred to the district where it was established pursuant to 12 U.S.C. § 94. As the Multidistrict Panel noted, "The operation of 12 U.S.C. § 94 does not preclude transfer under 28 U.S.C. § 1407 because the latter is not encumbered by venue considerations." 369 F.Supp. at 1406, fn. 1. For other Section 1407 transfers involving national banks, see, *In re Pittsburgh and Lake Erie Railroad Company Securities and Antitrust Litigation,* 374 F.Supp. 1404 (JPML 1974); *In re Multidistrict Litigation Involving Banking Agreements with Stirling Homex Corporation,* 388 F.Supp. 572 (JPML 1975); *In re Falstaff Brewing Corp. Antitrust Litigation,* 434 F.Supp. 1225 (JPML 1977); *In re New York City Municipal Securities Litigation,* 439 F.Supp. 267 (JPML 1977); *In re Nat. Student Marketing Litigation,* 413 F.Supp. 1159, 1161 (D.D.C. 1976).

As stated by Professor Moore, "Section 94 of Title 12 does not preclude transfer under 28 USC § 1407 for consolidated pretrial proceedings, since that section operates independent of venue considerations." 1 Moore's Federal Practice ¶0.144[2.-1] at p. 1478 (2nd ed. 1977). See also, *In re New York City Municipal Securities Litigation,* ___ F.2d ___ (2nd Cir. March 2, 1978) (slip. op. at 1798); *In re Equity Funding Corporation of America Securities*

Litigation, 416 F.Supp. 161, 178-179 (C.D.Cal. 1976); *Wyndham Associates* v. *Bintliff,* 398 F.2d 614, 618-19, fn. 1 (2nd Cir.), *cert. denied,* 393 U.S. 977 (1968).

UNDER THE PLAIN LANGUAGE OF SECTION 1407 EVERY "CIVIL ACTION" INCLUDES ACTIONS INVOLVING NATIONAL BANKS

This action falls within the plain language of 28 U.S.C. § 1407 which provides:

> "When *civil actions* involving one or more common questions of fact are pending in different districts, such actions may be transferred to *any district* for coordinated or consolidated pretrial proceedings."

By analogy, this Court has firmly rejected attempts to limit the reach of the phrase "any civil action" in Section 1404(a). Chief Justice Vinson, speaking for the Court, held that Section 1404(a) applied to actions under the Federal Employers' Liability Act, *Ex parte Collett,* 337 U.S. 55 (1949), and to civil actions brought by the United States under the antitrust laws. *United States* v. *National City Lines,* 337 U.S. 78 (1949). In rejecting an argument identical to that advanced here by Akron Bank, the Court said:

> "The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from 'any civil action.'" 337 U.S. at 58. (footnote omitted)

The Court refused to read into the statute any implied exceptions, even for actions founded upon special statutory grants of venue. *See, e.g., Continental Grain Co.* v. *Barge FBL-585,* 364 U.S. 19 (1960); *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.,* 342 U.S. 180 (1952).

THE LEGISLATIVE HISTORY OF SECTION 1407 MANDATES ITS APPLICATION TO AKRON BANK

Section 1407 clearly is applicable to this case. The Section was enacted after voluntary cooperation between counsel and the judiciary in the electrical equipment antitrust cases. The necessity for the legislation is set forth in the Report of the Co-Ordinating Committee of the Judicial Conference on Multiple Litigation Recommending New Section 1407, Title 28, reprinted at 298 F.Supp. 498, 499-500, "Transfer to the most desirable forum is provided by permitting pre-trial transfer 'to any district.' Present transfer provisions for civil actions, which are not limited to pretrial proceedings, restrict the transferee districts available . . . [to a district] . . . 'where it [the action] might have been brought' . . . [28 U.S.C. § 1404 or] 'could have been brought' [28 U.S.C. § 1406(a)]." If as Akron Bank contends transfer is limited to the district where the action might have been brought under Section 94, then legislation was not required. On the contrary, Section 1407 was enacted because "Existing law is inadequate for such pretrial consolidation, since under 28 U.S.C. 1404(a) transfer is restricted to a district where the action 'might have been brought.'" *House Report No. 1130,* U.S. Code Cong. & Adm. News 1898, 1900 (1968).

Specific exemption from transfer pursuant to Section 1407 is provided for certain antitrust actions brought by the United States, § 1407(g) (A-3-4), and a specific enactment exempted Securities and Exchange Commission ("SEC") equitable proceedings, 15 U.S.C. § 78u(g) (A-4). No exemption for national banks is provided in Section 1407. To read § 1407 to provide such an exemption "would give national banks . . . a privilege unavailable to" other parties. *Third National Bank in Nashville* v. *Impac Limited, Inc.,* CCH Federal Banking

L.Rep. ¶97, 175 at p. 82, 446 (Sup.Ct. 1977).[5] Here, as in *Impac,* "No reason has been advanced for assuming that Congress intended such disparate treatment." *Ibid.* On the contrary, Congress was aware of the limited exceptions to Section 1407. As Congress stated when it enacted S.249, which exempted SEC equitable proceedings from § 1407, "Presently, the law exempts from its operation actions brought by the Department of Justice under the federal antitrust laws." Securities Acts Amendments of 1975, 94th Cong. 1st Sess., Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, to accompany S.249, U.S. Govt. Printing Office 1975, p. 73. "If § 94 was to be preserved from the reach of 28 U.S.C. §1407, a specific exception would have been required. For excellent reasons Congress made none." *In re New York City Municipal Securities Litigation, supra,* ___ F.2d ___ (slip. op. at 1800).

GRANTING THE WRIT WOULD VITIATE THE PURPOSE OF SECTION 1407

Section 1407 was enacted to avoid waves of litigation which threatened to engulf the courts.

> "The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions.
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> • • •
>
> "The committee believes that the legislation will provide desirable improvements in judicial administration and will assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation." House Report No. 1130, U.S. Code Cong. & Adm. News 1898, 1899, 1901 (1968).

5. In *Impac,* this Court refused to apply 12 U.S.C. § 91 to a state court injunction proceeding against a national bank brought by a debtor seeking to protect its own property from wrongful foreclosure.

Carving out a judicial exception to § 1407 for the venue provisions of § 94 will preclude the efficient handling of many types of actions: those against more than one national bank, those against one national bank and other multidistrict parties, and those brought under other venue statutes.

As indicated above, Section 1407 has been used in at least six other cases involving national banks.

Granting a writ of certiorari in this case to consider whether the special venue section of the National Bank Act precludes application of Section 1407 is an open invitation to virtually every party opposed to transfer pursuant to Section 1407 to claim exemption on the grounds that particular venue statutes render Section 1407 inapplicable.

Cases founded on product liability, *In re Aviation Products Liability Litigation,* 347 F.Supp. 1401 (JPML 1972), the securities laws, *In re Kauffman Mutual Fund Actions,* 337 F.Supp. 1337 (JPML 1972), the antitrust laws, *In re Hotel Telephone Charge Antitrust Litigation,* 341 F.Supp. 771 (JPML 1972), patents, *In re Panty Hose Seaming Patent Litigation,* 402 F.Supp. 1401 (JPML 1975), diversity of citizenship, the Jones Act, *Leith* v. *Oil Transp. Co.,* 321 F.2d 591 (3rd Cir. 1963), all involve particular venue statutes. Any party under any venue statute seeking to avoid transfer has a claim similar to that asserted by Akron Bank. Exclusion from Section 1407 of cases brought under special venue statutes will not "provide desirable improvements in judicial administration." *House Report No. 1130, supra,* U.S. Code Cong. & Adm. News (1968) at p. 1901.

THE TWO STATUTES ARE NOT IN CONFLICT AND MAY BE HARMONIZED

Section 94 designates a district in which an action against a national bank may be brought. This action against Akron

Bank was brought in such district.[6] Section 1407 was enacted to enable the federal court system to handle the multiplicity of lawsuits involving common questions of fact which threatened to inundate the courts. The composition of the Multidistrict Panel was designed to be representative of the federal judiciary and the Multidistrict Panel was vested with broad discretion to determine when transfer for coordinated or consolidated pretrial proceedings is appropriate. One of the guidelines to be considered in exercising this discretion is the convenience of parties and witnesses. This is a determination which must be made by the Multidistrict Panel on a case by case basis, and Section 94 is one, but not the only factor which it may consider. In this case the Multidistrict Panel fully considered Section 94 and determined that the "just and efficient conduct" of seven actions, five against national banks established in different districts, would best be served by transfer to one judge rather than having five or more judges attempt to deal with the same discovery issues.

This Court has held that Section 94 was designed to prevent the transportation of the books and records of a national bank from its home office. As repeatedly recognized by the Multidistrict Panel, nothing in Section 1407 mandates such transportation:

> "defendant national banks need not worry about a transferee court's entering an order requiring that their documents be moved outside their home districts for trial because transfers under Section 1407 are for pretrial only and the actions against them will be remanded to their home districts for trial. *See* Rule 11, R.P.J.P.M.L., 65 F.R.D. 253, 260-63 (1975). Moreover, we note that transfer of an action under Section 1407 does not mean that all discovery

6. It is the Trustee's position that the Southern District of New York action against Akron Bank is properly maintainable in New York pursuant to *Williams* v. *Austrian*, 331 U.S. 642 (1947).

> must take place in the transferee district. For example, depositions of witnesses may still occur where they reside, see Fed.R.Civ.P.45(d)(2), and of course any party may request an order from the transferee court that its documents be inspected at its offices or at another convenient location in or near the city in which it is located, *see Manual for Complex Litigation,* Part I, § 2.50 (rev. ed. 1973)." *In re Falstaff Brewing Corporation Antitrust Litigation,* 434 F.Supp. 1225, 1229-30 (JPML 1977).

In this action all discovery of Akron's books and records has occurred in Ohio. In this age of "improvements in data processing and transportation," *Citizens and Southern National Bank* v. *Bougas,* 46 U.S. Law Week 4001, 4004 (Sup. Ct. 1977), original records may be copied in the bank's home district and transported elsewhere. Section 94 is a factor for consideration by the Multidistrict Panel in its determination of the "convenience of parties", see, e.g., *In re Westec Corporation,* 307 F.Supp. 559, 562 (JPML 1969), but cannot frustrate the Congressional mandate that "civil actions . . . may be transferred to *any* district" by tying the hands of the Multidistrict Panel so as to preclude application to cases involving national banks.

Other courts have held that Section 94 should not be permitted to paralyze the judicial system. As noted in a case holding that Section 94 is not applicable to a counterclaim filed against a national bank, "[T]he purpose of having mandatory counterclaims is to have all related claims adjudicated in a single forum. If 12 U.S.C. § 94 applies to such counterclaims, then the policy will be thwarted for what appears to be no compelling reason. The Court cannot ascribe such an intent to Congress, and concludes that Section 94 does not apply to mandatory counterclaims." *First Nat. Bank & Trust Co.* v. *Am. Sec. & Trust Co.,* 437 F.Supp. 771, 772-73 (D.D.C. 1977).

Akron Bank's argument that pretrial proceedings involving national banks cannot be transferred pursuant to 28 U.S.C. § 1407 because discovery is a "proceeding" is an attempt to exempt national banks from the federal system and creates additional conflicts with other statutes. The extreme position taken by Akron Bank is shown by the inherent impossibility of taking any discovery of third party witnesses who reside outside the district where the bank is established, despite Rule 45 of the Federal Rules of Civil Procedure, if the term "proceedings" encompasses all pretrial proceedings. Akron Bank cites a state court case, *Murphy* v. *First Nat. Bank of Chicago,* 228 N.W.2d 372 (Ia. 1975), allegedly in support of this argument (P-8-9). In fact, the holding in *Murphy* is the opposite. "[W]e are impelled to hold the taking of depositions and submission of interrogatories, at least insofar as they relate to the issue of waiver, are not 'proceedings' under 12 U.S.C. § 94." 228 N.W.2d at 377.

Rather, "proceedings" in Section 94 refers to other types of cases or equitable proceedings. Some proceedings which have involved national banks are "proceedings in the nature of *quo warranto*" or "probate proceedings." *First National Bank* v. *Union Trust Co.,* 244 U.S. 416, 427, 428 (1917). The term proceedings is an alternative to suits or actions, *Bank of Bethel* v. *Pahquioque Bank,* 81 U.S. 383, 14 Wall 383, 395 (1871), and is used as such an alternative in other statutes, *e.g.*: 28 U.S.C. § 1446 ["civil action or proceedings"], 46 U.S.C. § 185 ["claims and proceedings"] and 18 U.S.C. § 1505 ["proceeding pending before any department or agency of the United States"].

IF THERE IS ANY CONFLICT BETWEEN 28 U.S.C. § 1407 AND 12 U.S.C. § 94 FOR THE LIMITED PURPOSE OF TRANSFER FOR PRE-TRIAL PROCEEDINGS, 28 U.S.C. § 1407, NOT 12 U.S.C. § 94, IS CONTROLLING

There is no conflict between 28 U.S.C. § 1407 and 12 U.S.C § 94. If the two statutes are in conflict, Congress, when it enacted 28 U.S.C. § 1407, partially repealed 12 U.S.C. § 94 by implication to the limited extent that the Multidistrict Panel may order transfers of actions involving national banks for coordinated or consolidated pre-trial proceedings.[7]

Repeal by implication has been recognized "where provisions in the two acts are in irreconcilable conflict." *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936), quoted with approval in *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148, 154 (1976). If 28 U.S.C. § 1407 and 12 U.S.C. § 94 are in "irreconcilable conflict" 28 U.S.C. § 1407 has partially repealed 12 U.S.C. § 94.

The Court of Appeals for the Second Circuit, in an opinion by Judge Friendly, recently decided this specific issue and held, without dissent, that 28 U.S.C. § 1407 had partially repealed 12 U.S.C. § 94. In *In re New York City Muncipal Securities Litigation,* ___ F.2d ___ (2nd Cir., decided March 2, 1978) (slip op. at 1799), the Second Circuit denied a petition for a writ of mandamus to review the Multidistrict Panel's order which transferred two cases

7. None of the cases cited by Akron Bank as allegedly relating to the conflict between § 94 and § 1407 involved § 1407 in any manner. *In re Truck Accident Near Alamagordo, New Mexico,* 387 F.Supp. 732 (JPML 1975) did not involve Section 94 and the Multidistrict Panel has held a bank's reliance upon that case to be misplaced. 437 F.Supp. at 1203.

against a national bank from the District of Massachusetts to the Southern District of New York pursuant to 28 U.S.C. § 1407.

> "On the other hand, the essential purpose of Congress in enacting § 1407 was to permit the centralization in one district of all pretrial proceedings '[w]hen civil actions involving one or more common questions of facts are pending in different districts.' As said in the report of the House Judiciary Committee, '[t]he objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the "just and efficient conduct" of such actions' and '[t]o accomplish this objective the bill provides for *the transfer of venue* of an action for the limited purpose of conducting coordinated pretrial proceedings.' H.R. Rep. No. 1130, 90th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Adm. News 1898, 1899-1900 (1968) (emphasis supplied). As this case illustrates, the need for such centralized management of pretrial proceedings in multidistrict litigation exists equally when national banks are defendants, but could not be met in such cases if 12 U.S.C. § 94 was held to prevent transfer under § 1407. The 'irreconcilable conflict' that signals implied repeal therefore exists. If § 94 was to be preserved from the reach of 28 U.S.C. § 1407, a specific exception would have been required. For excellent reasons Congress made none."___F.2d___(slip op. at 1799-1800).

Thus, any apparent conflict between Section 94 and Section 1407 was properly resolved by the Multidistrict Panel in favor of Section 1407.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX

28 U.S.C. § 1407

§ 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the

panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order

denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include

section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act. As amended Pub. L. 94-435 Sept. 30, 1976, 90 Stat. 1396.

12 U.S.C. § 94

§ 94. Venue of suits

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

15 U.S.C. § 78 u (g)

Consolidation of actions; consent of Commission

(g) Notwithstanding the provisions of section 1407(a) of Title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission. The term "securities laws" as used herein includes the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and the Securities Investor Protection Act of 1970.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition of Respondent James Bloor as Trustee of Investors Funding Corporation of New York to First National Bank of Akron's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit were served on the following by mailing by first class mail to their respective attorney(s) at the address indicated below:

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I further certify that all parties required to be served have been served.

Dated: May 5, 1978

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